No. 87-766

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In The

Supreme Court of the United States

October Term, 1987

STATE OF FLORIDA,

Petitioner,

vs.

MICHAEL A. RILEY,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

Marc H. Bauer, Esq.
7714 Massachusetts Avenue
New Port Richey, FL 34653
(813) 848-3412
Counsel for Respondent

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QUESTION PRESENTED

The Question presented may be phrased in the alternative:

A. Whether the surveillance of the interior of a covered greenhouse within the curtilage of a private residence, from the vantage point of a helicopter circling 400 feet or less above the greenhouse and residence, is a search for which a warrant is required.

OR

B. Whether the surveillance of the interior of a residential backyard covered greenhouse in which an individual has manifested an expectation of privacy from aerial observation, from the vantage point of a helicopter circling at 400 feet or less, is a violation of privacy interest society is willing to recognize as reasonable.

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No. 87-764

In The

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October Term, 1987

STATE OF FLORIDA,

Petitioner,

vs.

MICHAEL A. RILEY,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Florida Supreme Court (J.A. 110-139) is reported as *Riley v. State*, 511 So.2d 282 (Fla. 1987). The opinion of the Florida District Court of Appeal, Second District (J.A. 99-109), styled *State v. Riley*, is reported as 476 So.2d 1354 (Fla. 2d DCA 1985). The opinion of the Florida Circuit for Pasco County on pre-trial motion to suppress (J.A. 92-98), styled *State v. Riley*, is not reported, but is reprinted verbatim in the body of the District Court's published opinion at 476 So.2d 1354, 1354-55.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effect, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, Section 12 of the Florida Constitution provides:

> SECTION 12. Searches and seizures. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

Article I, Section 23 of the Florida Constitution provides:

> SECTION 23. Right of privacy. Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

49 U.S.C. § 1301(29) provides:

> (29) "Navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft.

14 C.F.R. § 91.79, relied upon by the Florida Supreme Court, provides:

> 91.79 Minimum safe altitude; general.
> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
>
> (a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.
>
> (b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.
>
> (c) Over other than congested areas. An altitude of 500 feet above the surface except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.
>
> (d) Helicopters. Helicopters may be operated at less than the minimums prescribed in paragraph ~~(b)~~ or (c) of this section if the operation is conducted without hazard to person or property on the surface.

In addition, each person operating a helicopter shall comply with routes or altitudes specifically prescribed for helicopters by the administrator.

STATEMENT OF THE CASE

Michael Riley was charged by information on August 16, 1984 with two (2) counts of violating Section 893.13, Florida Statutes (1983); the unlawful manufacture and possession of marijuana. J.A. 3-6. Riley filed a Motion to Suppress evidence, (J.A. 7-10), which on December 19, 1984 was granted by the trial court. J.A. 91-98.

The District Court of Appeal, Second District of Florida, reversed the trial court. J.A. 99-109. The Florida Supreme Court unanimously quashed the District Court's opinion, reinstating the trial court's suppression of the marijuana. J.A. 110-139.

The Florida Supreme Court relied on *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) and held that Riley had a reasonable expectation of privacy in the contents of his greenhouse. Considering the rationale of Katz, the Court noted that the determination of whether a police officer is in a place he or she may have a right to be is not always conclusive of whether particular actions constitute a search.

The court ascertained that Riley's greenhouse was within the curtilage of his home and, consequently, was afforded a high degree of protection. The fact that a few panels were missing from the roof of his greenhouse did not alter the court's conclusion that Riley had manifested an expectation of privacy from both ground and aerial surveillance.

The court determined the contents of Riley's greenhouse were not exposed to the public flying in public navigable airspace and his expectation that they would not be observed through helicopter surveillance at an altitude of 400 feet, was reasonable. The court noted differences between surveillance from aircraft at an altitude of 1,000 feet and a helicopter circling a residence at an altitude of 400 feet.

The court did not base its decision on arbitrary rules of navigable airspace or on the potential abuse of helicopters. Their decision was based upon examining Riley's expectation of privacy in light of *Katz* and *Ciraolo*, finding that unlike *Ciraolo*, the marijuana was not viewable from the "public airways". J.A. 133. Declaring Riley's expectation of privacy reasonable, the court held the surveillance from a helicopter circling Riley's residence at 400 feet, was a search for which a warrant was required.

The Florida Supreme Court also relied upon Article I, Section 23, Florida Constitution, which specifically confers upon citizens of the State of Florida privacy protection from governmental surveillance.

The structure, which has been called a greenhouse throughout this case, does not have the appearance of one in the professional sense, but probably would so be classified within the broad terms of the word, and, consequently, will be referred to as a greenhouse by Respondent in this brief.

Certain findings of fact made by the trial court are found within its order granting Respondent's Motion to Suppress: J.A. 92-97.

1. Of relevance to the question presented are the following factual findings of the trial court:

(a) Respondent, Michael A. Riley, rented a mobile home situated on a parcel of property containing approximately five (5) acres.

(b) On the property were several smaller buildings, the major building located within ten (10) to twenty (20) feet of the rear of the mobile home.

(c) The mobile home and buildings were enclosed or partially enclosed by a wire fence.

(d) There was a "do not enter" sign posted in front of the mobile home.

(e) The mobile home was occupied by Respondent as a dwelling.

(f) The property is located in a rural area and contained numerous trees and shrubs.

(g) The major out building located within ten (10) to twenty (20) feet to the rear of the mobile home is enclosed on two (2) sides. One (1) of the unenclosed sides is open to an area of trees and shrubbery (within the fenced area) which obscures vision into the interior of the building. The remaining open side is obscured by the mobile home and one (1) or more trees.

(h) The building has a roof, in which there are two (2) openings.

2. The contents of the greenhouse were not visible from any adjacent property.

3. Pasco County Sheriff's Deputy, Kurt Gell, and a pilot employed by the Pasco County Sheriff's Department, flew over the property in a helicopter at 400 feet; it being unclear whether the helicopter descended below 400 feet.

4. The helicopter circled the greenhouse twice and through the openings in the roof and one or more sides, Deputy Gell observed marijuana plants.

5. The evidence was subsequently seized pursuant to a search warrant.

6. The trial court made several mixed factual and legal findings:

(a) Respondent exhibited an actual and reasonable expectation of privacy in an area which is protected by the Fourth Amendment and the Declaration of Rights.

(b) The greenhouse is within the curtilage and is therefore a constitutionally protected area.

(c) By covering the greenhouse with a roof evidenced "clear indicia" of a desire for privacy from the air.

7. Several other factors within the record have relevancy to the question presented:

(a) Deputy Gell attempted to view the interior of the greenhouse from a public road, but was unable to identify its contents. J.A. 21.

(b) The helicopter first flew over the area and then circled over the top of the residence. J.A. 24 & 26.

(c) The helicopter was "a lot higher" when it first flew in, than when it circled. J.A. 31.

(d) It was at the time that the helicopter *circled* over the residence that Deputy Gell observed the marijuana. J.A. 26.

8. Though it is not completely clear from the record whether the helicopter descended below 400 feet, Deputy Gell indicated during testimony at the Motion to Suppress that the helicopter flew in at one (1) height and then descended to circle Riley's residence. Deputy Gell's testimony was somewhat contradictory. A reasonable interpretation of his testimony could be that the helicopter first flew over Riley's residence at 400 feet and descended to perform the circling maneuvers.

9. Respondent disagrees with the following facts as portrayed by Petitioner:

(a) Assumptions that the marijuana plants were six (6) to twelve (12) feet high is not supported by the record including the photographic evidence. It is unlikely the greenhouse is over eight (8) feet high and only a few plants were near that height.

(b) There is no evidence the holes in the roof were caused by the "conscious act" of the Respondent.

(c) There is set forth within the trial court's order granting the Motion to Suppress, an abundance of direct evidence of Riley's intention to conceal the contents of his greenhouse.

(d) The statement of the Florida Supreme Court that they "do not believe one could easily see" what was seen here from a fixed-wing aircraft as from

a helicopter (J.A. 133) was supported by the photographic evidence (Def. Ex. A-1 at R-3, J.A. 45, and Def. Ex. H-3 at R-4, J.A. 45) and the testimony of Deputy Gell. J.A. 18-46.

(e) There are no facts indicating Riley was in any way involved in the distribution of marijuana or any business venture involving any illicit drugs.

SUMMARY OF THE ARGUMENT

Michael Riley manifested a reasonable expectation of privacy from ground and aerial observation in the contents of his greenhouse located ten (10) to twenty (20) feet behind his residence. Riley subjectively and objectively manifested his privacy expectations, evidenced by the normal precautions he took to keep its contents from public view.

The reasonableness of Riley's privacy expectation must be considered with particular reference to two (2) factors:

1. Was the area in which Riley manifested his privacy interest (i.e. the greenhouse) within the curtilage of his residence, and

2. Did he knowingly expose his activities to the general public.

Contemplation of the criteria needed in determining whether Riley's greenhouse is within the curtilage, including the proximity to his residence (here ten (10) to twenty (20) feet), the fact the greenhouse was within the same fence enclosure, the measures he took to secure his

privacy in the area and the realities that gardening is an activity associated with the home, leads to the conclusion that Riley's greenhouse was within the curtilage of his residence. That the plants within the greenhouse were not legal, should not, in and of itself, alter this conclusion.

Individual privacy interests within the home and curtilage have long been entrenched within Fourth Amendment history. The curtilage is considered part of the home for Fourth Amendment purposes and Riley may be said to receive a presumption that privacy expectations concerning activities or objects within the curtilage are reasonable.

Though a person, who knowingly exposes his activities may lose the benefit of Fourth Amendment privacy protections, Riley did not so expose the contents of his greenhouse. To dispute the reasonableness of an individual's privacy expectations from aerial surveillance in and around the home, because of the presence of daily air traffic, is to ignore the site of that traffic. Whether Riley exposed the contents of his greenhouse to the public must be ascertained with reference to where the public would reasonably be expected to be. Riley could logically assume that members of the public would not circle his residence in a helicopter at an altitude of 400 feet and attempt to peer into his greenhouse. The contents of that greenhouse were not exposed to the public flying in areas where they would be expected, i.e. public navigable airspace.

The concept of public navigable airspace as used in *Ciraolo* was not a boundary of where permissible aerial

surveillance may take place, but an illustration of the location where individuals should expect members of the public using the airways. Activities on the ground readily exposed to people in that airspace lose Fourth Amendment protection. The Florida Supreme Court was cognizant of the meaning of *Ciraolo* and determined that the contents of Riley's greenhouse was not exposed to that vantage point.

To allow an aerial search of a person's home or curtilage merely because the vantage point may have been where a law enforcement officer technically had a legal right to be, ignores reasonable privacy expectations in the home and reverts to the analysis of Fourth Amendment protection referenced to physical intrusion or trespass. Such analysis fails to consider the use of technology to assist in surveillance and would expose the intimate lives of citizens to the government watching from the sky.

The decision of the Florida Supreme Court has a negligible effect on the use of helicopters and other aircraft for legitimate law enforcement purposes, including the apprehension of fleeing felons, and the observation of marijuana growing in the open fields or exposed to the general public.

In *Riley* the Florida Supreme Court correctly applied accepted Fourth Amendment principles in holding that Riley's privacy expectations were reasonable and the aerial surveillance of his greenhouse was a search for a which a warrant was required.

ARGUMENT

I. HISTORICAL PERSPECTIVE

A. Introduction

The case of the *State of Florida v. Michael Riley* involves the extent of a citizen's Fourth Amendment protection from aerial surveillance. More particularly, this court's decision may, in fact, determine whether an individual, within the confines of his private residence, has any constitutional protection from government aerial surveillance. The analysis must, of course, be made within the framework of Fourth Amendment principles and with particular emphasis upon society's recognition of reasonable expectations of privacy within the home and immediate surrounding areas. This court has an opportunity to set the parameters of acceptable aerial surveillance and Respondent Riley urges this court to set those parameters in a manner that is cognizant of the personal and societal values which bestow legitimate privacy interests within the home and curtilage. Respondent urges this court not to lose sight of technological tools, be they of a telescopic, audio or aerial nature, which allow police access to various platforms of observation; instruments which enable surveillance into areas society has consistently defined as private. But, most of all, Respondent urges this court not to lose sight of the legitimate, fundamental and precious rights citizens enjoy, to be free from governmental surveillance of their homes and curtilage; surveillance from which citizens have no shield.

B. History of Fourth Amendment Analysis.

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures".[1] Prior to *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), Fourth Amendment analysis revolved around the questions of trespass or physical intrusion into a constitutionally protected area.[2] The decision in *Katz* shifted the focal point to a determination of whether a person's "reasonable" or "legitimate" expectations of privacy have been invaded by governmental action.[3]

The shift in Fourth Amendment analysis is credited to Justice Harlan's grasp of the dangers of technological

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[1] Amend. IV, U.S. CONST.

[2] *Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928); *Goldman v. United States*, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322 (1942).

[3] *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) in which the concurring opinion of Justice Harlan has evolved as the touchstone of Fourth Amendment analysis. Justice Harlan set forth a two-pronged test: " . . . first that a person has exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'." *Katz, supra*, 389 U.S. at 359, 88 S.Ct. at 516 (1967) (Harlan, J. concurring). A majority of the court adopted Justice Harlan's rationale in *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). There the court also noted: "whether in the words of the *Katz* majority, the individual's expectation, viewed objectively, is 'justifiable' under the circumstances". *Smith v. Maryland, supra*, 442 U.S. at 739, 99 S.Ct. at 2580.

advances on Fourth Amendment protections. Commenting upon the rationale which interpreted the Fourth Amendment in the context of a physical intrusion or lawful vantage point of a search, Justice Harlan stated:

> "It's limitation on Fourth Amendment protection is, in the present day, bad physics as well as bad law, for reasonable expectations or privacy may be defeated by electronic as well as physical invasion."[4]

Though *Katz* departed from what was then the traditional concept of Fourth Amendment analysis, Justice Harlan noted that Fourth Amendment determinations generally required a reference to a place.[5]

Consequently, this court today should determine the propriety of the aerial surveillance with particular reference to the two-pronged test of *Katz:* had Michael Riley manifested an expectation of privacy from ground and aerial surveillance, and was that expectation one that society is willing to recognize as reasonable. This court likewise should consider the place in which Respondent harbored his expectation and consider whether it is an area society has bestowed the highest privacy interest and the highest protection from government intrusion.

An attempted analysis of this case, simply based on whether the occupants of the helicopter made their observations from a lawful place (i.e. without a physical intrusion or trespass), would be a regression to the limited pre-Katz Fourth Amendment theory.

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[4] *Katz, supra,* 389 U.S. at 363, 88 S.Ct. at 517 (1967) (Harlan, J. concurring).

[5] *Katz, supra* (Harlan, J. concurring).

II. THE QUESTION: "DID RILEY MANIFEST AN EXPECTATION OF PRIVACY IN THE CONTENTS OF HIS GREENHOUSE AND WAS THAT EXPECTATION REASONABLE?" SHOULD BE ANSWERED IN THE AFFIRMATIVE.

A. Riley's manifestation of an expectation of privacy in the contents of his greenhouse from both ground and aerial observation is amply supported by the record.

Riley evidenced both a subjective and objective expectation of privacy in the contents of his greenhouse. The mobile home in which Riley had a legal[6] possessory leasehold interest (J.A. 47) was situated on approximately five (5) acres of land. J.A. 48. The mobile home and greenhouse were enclosed by a wire fence (J.A. 20) and a "do not enter" sign was posted in front.[7] The greenhouse was within ten (10) to twenty (20) feet of and directly behind the mobile home. J.A. 22. Thick shrubbery and underbrush surrounded the mobile home and greenhouse on at least three (3) sides.[8] Due to the shrubbery, the mobile home and the positioning of the greenhouse directly behind the mobile home, it's contents were not viewable from the public roadway (J.A. 20-21); or from any adjoining property. J.A. 47. A roof was constructed on the greenhouse and though there were two (2) missing panels, the photographic evidence supports the conclusion that the contents of the greenhouse were not visible

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[6] Fla. Stat. § 83.43(2)(b) (1983) and § 83.43(7) (1983).

[7] Order of Circuit Court (J.A. 93).

[8] Def. Ex. A-l, B-2, H-3, G-4, R 3-4, J.A. 45.

from altitudes considered navigable airspace.[9] Nor were they readily discernable through the openings in the roof or side, from the low altitude at which the photographs were taken.[10] The Florida Supreme Court's statement: "We do not believe that the details observed here from the vantage point of a circling and hovering helicopter could just as easily have been discerned by any person casually flying over the area in a fixed wing aircraft"[11] was supported by the record. In fact, it is apparent the contents of the greenhouse were not visible from the original altitude of the helicopter as it first flew over Riley's residence and greenhouse. Not until descending and circling did the marijuana become discernable.[12]

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[9] 49 U.S.C. 1301 (29) and 14 C.F.R. § 91.79 are set forth in text, *supra*.

[10] Def. Ex. A-l and H-3, R3-4, J.A. 45

[11] *Riley v. State*, 511 So.2d 282 (Fla. 1987) cert. granted, ___ U.S. ___, 108 S.Ct. 1011, 98 L.Ed.2d 977 (1988), J.A. 133.

[12] The testimony of Deputy Gell indicates the helicopter first flew over the house and then descended to a lower altitude and circled Riley's residence at which time the marijuana was observed. The following colloquy is noted:

Q. Now when you got over the property with the helicopter, what did you do?

A. We circled the top, over the top of the residence, observed the greenhouse and saw there was several plants, large, that were growing inside. We could observe *at that time* (emphasis added) that there was marijuana growing inside. at J.A. 26.

(Continued on following page)

From this record, both the trial court and the Florida Supreme Court justifiably determined that Riley manifested an expectation of privacy from aerial and ground observation.

B. Riley's expectation that the contents of his greenhouse would not be subject to aerial observation was *reasonable* and an expectation that society is prepared to honor.

1. An individual is required to take only normal precautions to insure privacy.

The reasonableness of Respondent Riley's expectation of privacy from aerial observation cannot be contingent upon success or lack thereof in concealment of the marijuana within the greenhouse. Obviously if Respondent was completely successful in such concealment, this case would not be before the court. Those invoking the protection of the Fourth Amendment need only take normal precautions to maintain their privacy.[13] Commonly

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(Continued from previous page)

Then the following:

Q. Well, you come over at a certain level, correct, and you were looking at the ground and the trailer at that level, am I correct?

A. Well, when we come in, we were a lot higher than when we circled. at J.A. 30-31.

[13] *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1980) where the court stated: "So far as normal sidewalk traffic was concerned, this fence served that purpose because respondent took normal precautions to maintain his

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used technology makes complete concealment of private activities next to impossible and to require more than normal precautions to secure privacy would dismantle Fourth Amendment safeguards.

2. Reasonableness of privacy expectations, should not be determined based on distinctions between the various methods of surveillance.

Government surveillance upon private activities is a threat regardless of the vantage point from which it occurs.[14] Privacy expectations from aerial observation should be considered as legitimate as privacy expectations from ground or electronic observation, as long as "personal and societal values protected by the Fourth Amendment" are violated.

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privacy." (citations omitted), *Ciraolo, supra,* 476 U.S. at ___, 106 S.Ct. at 1812 (1986); and, also Justice Powell's concurring opinion: "In considering the reasonableness of asserted privacy expectations, the Court has recognized that no single factor invariably will be determinative. Thus, the Court has examined whether a person invoking the protection of the Fourth Amendment took normal precautions to maintain his privacy – that is, precautions customarily taken by those seeking privacy." (citations omitted), *Rakas v. Illinois,* 439 U.S. 128, 152, 99 S.Ct. 421, 435 (1978) (Powell, J. concurring); and, also *Rawlings v. Kentucky,* 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980).

[14] Because of the unique capabilities associated with aerial surveillance, be it the maneuverability of helicopters or high-tech aerial photographic equipment, surveillance from the sky may arguably pose the greatest threat.

3. The public's perception of the presence of everyday air traffic is that of aircraft travelling in the public airways.

To deprecate the reasonableness of Riley's expectation of privacy on the presence of fixed-wing aircraft and helicopters in the airways, is to ignore the obvious. Common public perception of aircraft involve planes and helicopters flying in the public navigable airways, not at altitudes of 400 feet or less and circling private residences. This perception of the location of aircraft in our society endows Riley's expectation of privacy an indicia of reason.

4. Judgments concerning the reasonableness of privacy expectation must consider reference to a place.

In trying to decide whether personal and societal privacy values are at stake, it is frequently necessary to "make reference to a place".[15] That Riley's greenhouse was within the curtilage raises an inference that his privacy expectations were reasonable. Fourth Amendment interpretation generally requires reference to a place. As noted in *Oliver v. United States,* 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984), there is a "societal understanding" which bestows upon particular areas "the most scrupulous protection from government invasion". Deeply entrenched within Fourth Amendment history is the recognition that the home and curtilage are afforded

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[15] *Katz v. United States, supra,* 389 U.S. at 361, 88 S.Ct. at 516, (1967) (J. Harlan concurring).

the highest privacy expectations.[16] The court, in *Oliver*, reaffirmed the "open field's doctrine" of *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924) but left no doubt that the curtilage is to be considered part of the home for Fourth Amendment purposes.[17] That a particular privacy assertion arises from the home or curtilage may be said to raise a presumption of reasonableness.[18]

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[16] *California v. Ciraolo, supra, Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984), and, also *Payton v. New York*, 445 U.S. 573, 589, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) where the court stated "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home-a zone that finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their . . . houses . . . shall not be violated.' That language unequivocally establishes the proposition that '[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion'." (citations omitted) 445 U.S. 589-590, 100 S.Ct. 1381-1382

[17] *Oliver, supra*, 466 U.S. 179 at 180, 104 S.Ct. at 1742 (1984) "The distinction implies that only the curtilage, not the neighboring fields, warrants the Fourth Amendment protections that attach to the home. At common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a mans home and the privacies of life,' *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886), and therefore has been considered part of home itself for Fourth Amendment purposes."

[18] Besides the long recognized heightened privacy expectations associated with that area note also *United States v. Karo*, 468 U.S. 703, 104 S.Ct. 3296, 82 L.Ed.2d 53 (1984) "At the risk of

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To assume the concept of curtilage has little relevance whether, from aerial or ground surveillance, is disregarding the importance and sanctity given the home and curtilage in Fourth Amendment analysis.

5. Riley is entitled to the heightened privacy expectations in the contents of his greenhouse that is given to the home and curtilage.

Respondent's greenhouse was within the curtilage of his residence. Consideration of the four factors expressed in *United States v. Dunn*, ___ U.S. ___, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987), leads to the above conclusion.[19] Riley's greenhouse was only ten (10) to twenty (20) feet directly behind his home (an area that clearly constitutes

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belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable. Our cases have not deviated from this basic Fourth Amendment principle. Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances." (citations omitted) *Karo, supra*, 468 U.S. at 714-715, 104 S.Ct. at 3303 (1984)

[19] *United States v. Dunn, supra*, ___ U.S. at ___, 107 S.Ct. at 1139, 94 L.Ed.2d at ___, " . . . we believe that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." (citations omitted).

part of the backyard), located in such a manner as to be associated with the family activities, and the home and greenhouse were within the same fence enclosure. Greenhouses are used for planting and/or gardening activities usually associated with the home. That the gardening involved a plant the possession of being illegal, does not by itself remove the greenhouse from the curtilage protection.[20] There was no evidence that a commercial or agricultural business in marijuana was being operated. Forty-two (42) marijuana plants does not translate into an agricultural business even under the rankest of speculation. Riley also took numerous steps to protect the interior of his greenhouse from observation. Pursuant to the criteria of both *Dunn* and traditional concepts of the home and its intimate areas, there is little doubt the greenhouse was within the residential curtilage, and Riley should be afforded the personal and societal values associated with the sanctity of the home which is embedded in our Fourth Amendment traditions.

C. Riley did not expose his activities in a manner to forfeit society's recognition of the privacy interests in his home and curtilage.

Inherent in the teaching of *Katz* is the understanding that objects or activities knowingly exposed to the public

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[20] *People v. Roberts*, 240 Cal. Rptr. 658, 660 (Cal. App. 1987) where the court, in determining a greenhouse to be within the curtilage applying the factors of *Dunn* stated: "The greenhouse was apparently being used for growing plants, an essentially domestic activity." *People v. Roberts, supra*, at 660.

lose Fourth Amendment protection.[21] This reasoning encompasses the obvious – there was no intention manifested to keep them private. Riley, having manifested an expectation of privacy within an area society has consistently recognized as entitled to heightened privacy interests, the question then becomes whether he exposed his activities to the general public (more particularly that segment of the populace engaged in air travel).

Observations of activities or objects within the curtilage from a vantage point outside the curtilage have caused courts considerable difficulty. Judges have attempted to resolve such issues with reference to whether those activities or objects were "knowingly exposed to the general public". Such an analysis must consider the manner of exposure and the area to which it was exposed. Consistent with this rationale, some courts have allowed an observation from outside the curtilage if made from a vantage point where the public has been expressly or implicitly invited[22] or where the individual takes no measures to prevent observation.[23]

A line of cases have developed sustaining privacy rights within the home or curtilage when the observations have taken place from a lawful vantage point outside the curtilage, but from an area not expected to be

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[21] *Katz, supra*, 389 U.S. at 351, 88 S.Ct. at 511, *California v. Ciraolo, supra.*

[22] *Lorenzana v. Superior Court*, 511 P.2d 33 (Cal. 1973).

[23] *State v. Bridges*, 513 A.2d 1365 (Me. 1986).

used by the public at large, or where one would not reasonably expect the public to have been.[24]

Several of these cases have arisen after *Ciraolo* and (like the Florida Supreme Court in *Riley)*, have refused to extend *Ciraolo* to sanction all observation of the curtilage from lawful vantage points.[25]

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[24] *People v. Lovelace*, 172 Cal. Rptr. 65 (Cal. App. 1985) where the actions of the police standing in a public alleyway peering through knotholes and cracks in the defendant's fence allowing observation of marijuana growing in the defendant's backyard was found to violate reasonable privacy expectations. The court based its determination on the lack of showing that general members of the public would be in the position the officers were. The court stated: "We are of the opinion that the aforementioned line of cases purposively demonstrates that Officer Ford viewed the marijuana plants from a vantage point not expected to be used by the public at large". 182 Cal. Rptr. at 73. Also *People v. Fly*, 110 Cal. Rptr. 158 (Cal. App. 1973).

[25] *State v. Waldschmidt*, 740 P.2d 617 (Kan. App. 1987) declined to extend *Ciraolo* to allow the police to climb upon a barbed-wire fence adjacent to the defendant's fence and peer over defendant's fence, observing marijuana growing in defendant's backyard. The court stated: "The State in the present case argues that *Ciraolo* is controlling. The State contends the sheriff's observations were made from a public vantage point, as anyone could climb the adjacent barbed wire fence and peer into defendant's backyard. According to the State, defendant could have no reasonable expectation of privacy in this regard. The State's interpretation of *Ciraolo* is far too broad. If the State's position were adopted, the curtilage doctrine would be meaningless." 740 P.2d at 623; *Commonwealth v. Lemanski*, 529 A.2d 1085, 1092 (Pa.Super. 1987) in which the court refused to extend *Ciraolo* to allow the police positioned on a road, part

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D. Whether Riley knowingly exposed the contents of his greenhouse to the general public must be ascertained with reference to where one would reasonably expect the public to be.

Should Riley reasonably have expected members of the public to be circling his greenhouse at an altitude of 400 feet or would it be more reasonable to expect the public to be flying overhead in the manner and at the altitudes generally used for air travel[26] and to take reasonable precautions to secure privacy from those public vantage points?

As *Katz*, its progeny, and the recent cases interpreting *Ciraolo* teach us, the lawfulness of the platform of observation is not the criteria, but merely a factor to be

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shrubbery and with binoculars observe marijuana growing within the defendant's greenhouse. The court stated: "A police officer parting shrubbery and peering through binoculars into one's home is certainly an intrusion which infringes upon the values protected by the Fourth Amendment." 529 A.2d at 1092. *United States v. Cuevas Sanchez*, 821 F.2d 248 (5th Cir. 1987) in which the Fifth Circuit Court of Appeals refused to allow *Ciraolo* as justification for the authorities to position a video camera atop a power pole, adjacent to the defendant's property thus allowing observations of the defendant's backyard over his fence. The court stated: "It does not follow that *Ciraolo* authorizes any type of surveillance whatever just because one type of minimally intrusive aerial observation is possible." 821 F.2d at 251.

[26] 49 U.S.C. § 1304 provides in part "There is recognized and declared to exist in behalf of any citizens of the United States a public right of freedom of transit through *navigable airspace* of the United States." (emphasis added).

considered within a much broader context. To require more than reasonable attempts to secure privacy in the home or curtilage and to allow privacy rights so easily evaded simply by reference to a lawful place of observation, would seriously erode Fourth Amendment protection.

In our existing technological age, no activity is secure from government observation. Whether in the form of aerial observation, telescopic equipment, or high resolution devices, citizen's privacy interests in the home and curtilage can easily be avoided.

Sanctioning the use of a police helicopter to conduct surveillance and circle Riley's residence at an altitude and manner not normally expected from the general public and thus circumvent Riley's reasonable privacy precautions, allows Fourth Amendment protections to become meaningless.

Riley manifested an expectation of privacy in the contents of his greenhouse from ground and aerial observation. It cannot be said he exposed his activities to the general public such as to defeat the reasonableness of his privacy expectation. Thus lies the difference between this court's decision in *Ciraolo* and the Florida Supreme Court's decision in *Riley*.

III. THE DECISION OF THE FLORIDA SUPREME COURT IN *RILEY* WAS BASED UPON LEGITIMATE AND SIGNIFICANT DISTINCTIONS BETWEEN *RILEY* AND *CIRAOLO*.

A. Recent cases interpreting aerial surveillance in light of *Ciraolo* are consistent with the Florida Supreme Court's decision in *Riley*.

Though these cases have reached varied results based upon their own factual situations, their results have been consistent with *Ciraolo* and *Riley* Both *People v. Sabo*, 230 Cal. Rptr. 170, cert. denied ___U.S. ___, 107 S.Ct. 2200, 95 L.Ed.2d 855 (1987) and *People v. Roberts*, 240 Cal. Rptr. 658 (Cal. App. 1987) held that the actions of law enforcement officers, in circling or hovering over the defendant's greenhouse located within the curtilage of a private residence at altitudes below 500 feet (in *Roberts* it was approximately 300 feet and *Sabo* approximately 400 to 500 feet) in order to look through openings in a greenhouse, constituted a violation of reasonable expectations of privacy.[27]

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[27] It should be noted that contrary to Petitioner's observation, the California courts in *Sabo, supra, Roberts, supra,* and *People v. Romo*, 243 Cal. Rptr. 801 (1988) all reached results consistent with each other and consistent with *Ciraolo*. In *Romo*, the marijuana was growing open to the sky and viewed from airspace of 500 feet or above where the public normally would be expected. This was the same situation as in *Ciraolo*. Although the *Romo* court criticized the *Sabo* court's reasoning, particularly its reliance on "navigable airspace", it concurred with the result in *Sabo*. Likewise, the result in *United States v. Broadhurst*, 805 F.2d 849 (9th Cir. 1986) is consistent with *Ciraolo*. There the marijuana within the greenhouse was visible

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B. The Florida Supreme Court determined Riley did not expose the contents of his greenhouse to the public.

Ciraolo's marijuana plants were completely open to observation by any person flying over the area. This public exposure obviated any expectations that the marijuana plants would not be observed by a police officer located in the same place members of the public would be. Ciraolo's actions were analogous to placing potted marijuana plants on a windowsill facing a public thoroughfare. Law enforcement is not required to shield their eyes from what the passing public could readily see. Ciraolo was unable to claim the marijuana was not thus exposed. Riley legitimately can make such a claim. The photographic evidence (Def. Ex. A-1 and H-3 at R 3-4, J.A. 45) support such a finding as does the testimony of Deputy Gell.[28] The contents of Riley's greenhouse, only becoming identifiable from the vantage point of a

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from an altitude of 1,000 feet, obviously an area where the general public would have been expected to travel. Further, the greenhouse did not appear to be within the curtilage of the residence. See *Blalock v. Indiana*, 483 N.E. 2d 439 (Ind. 1985) where the Supreme Court of Indiana allowed aerial observation of a greenhouse at 800-900 feet, because the greenhouse was not within the curtilage of the home but on the opposite end of seventy-seven (77) acres.

[28] J.A. 24, 26-27, 30-31 Deputy Gell did not testify the marijuana was visible at the altitude at which Riley's residence was first flown over. The marijuana became visible after descending and circling the residence and greenhouse.

helicopter circling his residence at an altitude of 400 feet or less,[29] does not equate to an exposure to the public. The public engaged in air travel, private or commercial, fixed-wing or helicopters, does not fly at altitudes of 400 feet or less and circle residences.

C. "Public navigable airspace" in *Ciraolo* was not used as a demarcation of the lawful vantage from which aerial observation may occur.

The phrase, "public navigable airspace", served to illustrate that the location of the police observation was a place the public generally used for air travel. Since the marijuana plants were readily discernable from a location Ciraolo should have expected the public to be, he could not have a reasonable expectation that the plants would not be observed.

The facts in Riley are markedly different. The contents of his greenhouse were not exposed to the "public" location described in *Ciraolo*. Riley took more than reasonable precautions to obscure the observations of the contents from such "public" vantage points. One would not reasonably expect the public to circle his residence at

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[29] Though the Florida Supreme Court indicated it was unclear whether the helicopter descended below 400 feet, *Ciraolo, supra* (J.A. 113), several factors indicate that it did. The testimony of Deputy Gell, though somewhat contradictory, indicates that the helicopter was flying at 400 feet, but they first flew over the residence at one altitude and then circled at a lower altitude. (J.A. 24, 26-27, 3031) The photographic evidence (Def. Ex. A-l, H-3, R-3-4, J.A. 45) also cast doubt that the marijuana was observed at 400 feet.

an altitude of 400 feet or less attempting to peer into a greenhouse. Any member of the public flying at a normal altitude or in a normal manner, who happened to glance down, would not have seen what Deputy Gell observed.[30]

D. The Florida Supreme Court, in *Riley*, correctly applied the criteria of *Katz* and *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979).

The Florida court raised no objection regarding the purposeful aspect of the helicopter surveillance. This was not a factor in its decision. Petitioner wishes to find issues where there are none. The only reference to "purposeful" is found within a quotation from *People v. Cook*, 710 P.2d 299 (Cal. 1985) (J.A. 130) used by the Florida court as an illustration of the potential intrusiveness on private activities associated with helicopter surveillance.

Though the Florida court noted the intrusive nature of helicopter surveillance, this was not crucial to the result in *Riley*. The intrusiveness and disruption of private activities caused by low flying helicopter surveillance should be considered when attempting to define

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[30] *Riley, supra* (J.A. 133)
Though Florida argues that the helicopter did not hover, there is no testimony to that effect and one can assume that in order to take the photographs, (Def. Ex. A-l and H-3 at R3-4, J.A. 45) some hovering actually must have taken place. Regardless, for Fourth Amendment purposes, circling or hovering over a residence is a distinction without a difference.

parameters of permissible aerial observation. Intrusiveness may take several forms. Common experience observing helicopters landing or taking off obviates the need for specific testimony regarding the intrusiveness of low flying helicopters in terms of noise, wind and general disturbance of serenity. A helicopter at 400 feet or less is more physically intrusive in terms of noise and disruption than one at 1,000 feet. Intrusiveness may also take the form of the ability to observe many aspects of a citizen's private life from the vantage point of a low-flying helicopter. The helicopter flying in the airspace normally used for air travel is less intrusive in both senses.[31]

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[31] The intrusiveness of helicopter surveillance has been documented. In *Nat. Org. For Reform of Marijuana Law v. Mullen*, 608 F. Supp. 945, 955 (N.D. Cal. 1985), remanded for consideration of subsequent authority, F.2d 276 (9th Cir. 1986), the Federal District Court found the following testimony to be uncontradicted: "One morning Charles Keyes was at home with his five-year old son, Arthur, when four helicopters in a diamond shape came within 100 feet of our home, shaking and blowing treetops. At about 9:30 the largest helicopter came back, put the nose of the helicopter about 100 feet away at my eye level (I live on a hillside) and hovered watching me defecate on my outhouse. I didn't move, so he moved right above me. He blew the toilet paper away from me and Arthur had to retrieve it for me. Arthur and I left the property, as I feared for our safety. Marilyn Beckwith was similarly perturbed when she was 'continually buzzed' while taking her outdoor shower. Richard Moller described how he was relaxing in the bedroom of his rural home when a helicopter came flying within 100 feet. The helicopter 'was at tree-top height and the pilot had an unhindered view of my bedroom and bed through the glass door.' Two CAMP helicopters made severa! passes

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The capacity to see into our personal lives through low altitude helicopter surveillance should cause this court to scrutinize this type of police conduct. But whether a particular surveillance is found to be physically intrusive in a particular case should not be a factor in determining the constitutional limitations on low flying helicopter surveillance, especially considering: (a) the potential for physical intrusion in the form of disturbance; and, (b) the potential for intrusion imposed by surveillance of lawful private activities which are open to view from low altitudes. The lack of a physical intrusion is of little importance if reasonable expectations of privacy are invaded without physical intrusion.[32]

The Florida Supreme Court's decision in *Riley* was not based upon a fabricated bright-line rule between "purposeful" and "casual" helicopter flights, nor did it rely on the California Appellate court's decision in *California v. Sabo, supra.* The Florida court noted the factual similarities along with the California court's reasoning

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at about 100 to 150 feet over Susan McManus' home, 'flying at an angle so the people in the helicopter could observe us and what we were doing'."

[32] Though the 9th Circuit Court of Appeals in *Giancola v. State of West Virginia Department of Public Safety,* 830 F.2d 547 (4th Cir. 1987) discussed several factors to consider, but a single surveillance of the home or curtilage when reasonable privacy interests have been established with or without physical intrusion or disruption, is just as damaging to Fourth Amendment rights.

regarding navigable airspace, but did not base its decision on the fact the helicopter was below navigable airspace. Their decision was based upon analysis of Michael Riley's legitimate expectation of privacy in the contents of his backyard greenhouse. The court applied the rationale of *Ciraolo* and reasonably determined that the contents of the greenhouse were not exposed to the view of the general public flying in the public airways. The significant difference between viewing the interior of the greenhouse from the public airways with that of descending and circling Riley's residence at 400 feet or less, related directly to the reasonableness of his expectations of privacy. The Florida Supreme Court decision was an analysis of a factual situation different from that of *Ciraolo* and correctly applied the rationale of *Katz, Oliver.* and *Ciraolo.*

IV. A BRIGHT-LINE RULE THAT AERIAL OBSERVATION IS LAWFUL SO LONG AS THE POLICE OBSERVER IS WHERE HE HAS A LEGAL RIGHT TO BE IS A DEPARTURE FROM ESTABLISHED FOURTH AMENDMENT PRINCIPLES.

A. Since *Katz* and its progeny, the focus of Fourth Amendment analysis has been whether reasonable privacy interests have been violated[33] or as recently phased, "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment".[34]

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[33] *Katz, supra.*

[34] *Oliver, supra,* 466 U.S. at 182-183, 104 S.Ct. at 1743 (1984).

An attempt to decide this case simply upon a reference to the lawfulness of the platform of observation, ignores the prevailing theory of Fourth Amendment protection and regresses to the pre-*Katz* determination of "trespass" or "physical intrusion". If by positioning themselves in an aerial location (artificially claimed as a lawful vantage point due to the lack of F.A.A. violations[35]) and from that platform observe activities in the curtilage and the home, Fourth Amendment protection becomes a hollow echo of the past. From such vantage points all intimate activities of the home become open to police observation and citizens can do little to shield themselves from such invasion, short of boarding up windows and erecting roofs over back yards. From low altitudes, surveillance of the interior of homes through large picture windows, or glass areas becomes possible. Living and bath areas become visually accessible through sky lights. If Riley had a skylight in his home and a potted marijuana plant was observed through that skylight by the occupants of a helicopter circling his residence at an altitude of 400 feet or less, under Florida's

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[35] At lease one case *State v. Davis*, (Or. App. 1981) noted that F.A.A. regulations were designed to promote safety and were not rules for individual's reasonable expectations of privacy. If Petitioner is attempting to insinuate F.A.A. regulations have specific altitude limitations on helicopters, it should be noted. 14 C.F.R. § 135.203(b) refers only to congested areas. Consequently, one could argue a helicopter could descend as low as 25 feet off the ground and be within F.A.A. regulations as long as the descent could be accomplished safely. Obviously, then the regulations have no relationship to reasonable Fourth Amendment privacy protections.

proposed theory, such observation would be permissible. Homes are constructed to allow entry of fresh air, sunlight and the beauty of nature, not police surveillance. Society values are not such as to require access to air, light and nature be eliminated in order to prohibit the eye of the government. Since the curtilage is entitled to the same Fourth Amendment protection as the home, looking through openings in a structure is equated with looking through openings in a private residence.[36]

Not only do picture windows and skylights lend themselves to low-flying aerial observation, but windows in multi-story buildings are particularly susceptible to low altitude aerial surveillance. Under Florida's proposed rule, if lawful operation is the criteria and a police helicopter can lawfully descend to fifty (50) feet or less over a residential backyard, then everything exposed to the occupant's view, loses Fourth Amendment protection. Florida's proposed bright-line rule would allow such government intrusion since it fails to consider privacy interests in the home and curtilage. If the determination is only whether the police have a lawful right to be at that location, Florida, in a sense is requesting a "plain view" doctrine without the requirement of inadvertence.[37]

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[36] *Oliver, supra.*

[37] *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

If, as Florida asserts,[38] the police cannot, from a lawful vantage point, use telescopic or electronic listening equipment to gain access to a home or curtilage, there can be no constitutional difference with police use of a low flying and circling helicopter to gain the same access. The Fourth Amendment deprivation to the citizen is the same.

B. Florida's bright-line rule, even when phrased in terms of "naked-eye" observation, opens the door to the use of existing technology to aid in surveillance of homes and curtilage.

Once a particular search is deemed permissible, enhancement of the naked eye has likewise been determined permissible.[39] If the focus is on the platform of the search, as opposed to the legitimate privacy interests affected thereby, the use of sophisticated technical tools to assist in a search from an alleged lawful vantage point becomes a frightening prospect.

Attempting to distinguish which surveillance equipment is constitutionally permissible becomes an exercise in futility. Items that were considered sophisticated twenty (20) years ago are commonplace today. Likewise, technology rarely used today because of its sophistication may be widely used twenty (20) years from now. As more

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[38] Brief of Petitioner at 23.

[39] *Lee v. United States*, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270 (1952); *Dow Chemical Company v. United States*, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986).

sophisticated visual and audio eavesdropping technology becomes increasingly used, privacy rights decrease and the courts will have grave difficulty in attempting to draw what may be ever changing-lines.

Consideration of these factors lead to the present-day Fourth Amendment analysis. Technological threats to the privacy interests which society has long valued have not changed. Consequently, Fourth Amendment analysis should not deviate from the consideration of those privacy interests.

C. Florida's proposed rule allowing aerial surveillance as long as made from a lawful vantage point is not a bright-line rule.

Assuming Florida believes a helicopter is in a place it has a legal right to be as long as F.A.A. regulations are not violated, (a theory Respondent does not in any way adhere to), judicial attempts to determine whether these regulations are complied with will have to consider factors such as terrain, presence of neighboring structures and their distance from each other, weather conditions, skills of a pilot and even the unique maneuverability of a particular model aircraft. Under F.A.A. regulations, what may be safe operation in one situation may be unsafe in another. Surely such considerations cannot be said to form legitimate Fourth Amendment boundaries. Florida's bright-line rule thus becomes a case-by-case approach that has absolutely no reasonable relationship to justifiable Fourth Amendment privacy rights.

D. The warrantless aerial observation of the interior of Riley's greenhouse cannot be justified by reference to a "war on drugs".

Though Florida's brief, in its introduction, pays lip service to the above comment, interspersed through its argument are references to combatting crime (brief of Petitioner at 26); "The degree to which we must surrender in the war on drugs" (brief of Petitioner at 27); "A state like Florida awash in illegal drugs" (brief of Petitioner at 27); and insinuations this case involves "marijuana production for profit" (brief of Petitioner at 36). First, there is no evidence this case involves marijuana production for profit; second, the Fourth Amendment makes no distinction between types of criminal offenses.[40] As stated in *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984), "Those suspected of drug offenses are no less entitled to protection than those suspected of non-drug offenses." 468 U.S. at 717, 104 S.Ct. at 3304.

Such references to law and order passions are not relevant to constitutional protections. Respondent is not unmindful of attempts to balance societal values of privacy within and about the home with legitimate needs of constitutional law enforcement; but even attempting to place such reference in that context, they are but empty phrases. The plain fact of the matter; a decision by this court recognizing the personal and societal values of privacy within the home and curtilage, would have a

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[40] *Katz, supra*, 389 U.S. 347 at 360, 88 S.Ct. 507 at 516 (1967) (J. Douglas concurring)

negligible effect on the use of helicopters for effective law enforcement. A ruling reaffirming the standards of *Katz, Oliver,* and *Ciraolo* acknowledges the sanctity of the home or curtilage and recognizes the constitutional ramifications of low flying helicopters conducting surveillance on private activities within those areas. Requiring citizens to take only reasonable precautions to insure their privacy interests, will have absolutely *no* adverse effect on law enforcement's use of helicopters when: (a) involved in the hot pursuit of fleeing felons; (b) when conducting surveillance of open fields; and, (c) when observing activities or objects knowingly exposed to areas or altitudes in which the public normally travels. There is no evidence that this is one of a growing number of greenhouse cases, nor that backyard or greenhouse marijuana growing is anyway near as significant as large open field marijuana production.[41]

The decision in this case would have little effect on legitimate helicopter use by law enforcement but will significantly determine the extent all citizens will continue to enjoy personal and societal privacy protections within their homes and yards.

Warrantless aerial surveillance from an altitude or area not generally used for air travel by the public, of

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[41] Of the fifty-two (52) aircraft cases cited by Petitioner (brief of Petitioner at 22 and 23), only five (5) involve greenhouse-type structures and approximately thirty-nine (39) entail surveillance of open fields as opposed to private residences or their curtilage.

private homes and curtilages in which privacy expectations have been manifested is violative of the Fourth Amendment.

By retreating into their homes, and by building roofs on structures within the curtilage of their homes, individuals manifest privacy expectation from aerial observation. To prohibit government surveillance of activities occurring within those private areas not exposed to the general public, will have the effect of affirming a free society's fundamental privacy rights associated with the sanctity of an individual's home.

CONCLUSION

For the foregoing reasons, the decision of the Florida Supreme Court should be affirmed.

Respectfully submitted,

MARC H. SALTON
7714 Massachusetts Avenue
New Port Richey, FL 34653
(813) 842-2412
Attorney for Respondent